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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/790,289	03/01/2004	Kati A. Chevaux	1010/102US4	9500
32260	7590	10/23/2006	EXAMINER	
NADA JAIN, P.C. 560 White Plains Road, Suite 460 Tarrytown, NY 10591			WINSTON, RANDALL O	
			ART UNIT	PAPER NUMBER
			1655	

DATE MAILED: 10/23/2006

Please find below and/or attached an Office communication concerning this application or proceeding.

Office Action Summary

Application No.

10/790,289

Applicant(s)

CHEVAUX ET AL.

Examiner

Randall Winston

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-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☐ Responsive to communication(s) filed on 07/18/2006.
- 2a) ☐ This action is **FINAL**. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 31-78 is/are pending in the application.
- 4a) Of the above claim(s) 75-78 is/are withdrawn from consideration.
- 5) ☐ Claim(s) _____ is/are allowed.
- 6) ☒ Claim(s) 31-74 is/are rejected.
- 7) ☐ Claim(s) _____ is/are objected to.
- 8) ☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on _____ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) ☒ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some * c) ☒ None of:
1. ☒ Certified copies of the priority documents have been received.
2. ☐ Certified copies of the priority documents have been received in Application No. _____.
3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- 1) ☒ Notice of References Cited (PTO-892)
- 2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
- 3) ☒ Information Disclosure Statement(s) (PTO/SB/08)
Paper No(s)/Mail Date 0604.
- 4) ☐ Interview Summary (PTO-413)
Paper No(s)/Mail Date. _____.
- 5) ☐ Notice of Informal Patent Application
- 6) ☐ Other: _____.

DETAILED ACTION

Election/Restrictions

Applicant's election with traverse of Group I, claims 31-74 and its election of species of a specific cocoa polyphenol of the polyphenol of the formula An in its response to the restriction requirement of 07/18/2006 is acknowledged. The traversal is based on the grounds that there is no undue burden to examine both inventions groups/species because the search with respect to one inventive group/species is likely to uncover art relevant to the other group/species.

Applicant's argument is not found persuasive because, as Examiner explained in the previous restriction requirement of 06/30/2006, Inventions I and II are related as product (i.e. I) and process of use (i.e. II). The inventions can be shown to be distinct if either or both of the following can be shown: (1) the process for using the product as claimed can be practiced with another materially different product or (2) the product as claimed can be used in a materially different process of using that product (MPEP 806.05(h)). In the instant case, the product as claimed (i.e. cocoa polyphenol) can be used in a materially different process of using that product such as for the treatment of many disorders such as anti-neoplastic or anti-cancer (see, e.g. Romanczyk et al. US 5891905, see entire patent, especially the abstract). Therefore, the several inventions above are independent and distinct, each from the other. They have acquired a separate status in the art as separate subject for inventive effect and require independent searches. The search for each of the above inventions is not co-extensive particularly with regard to the literature search. Further, a reference which would

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anticipate the invention of one group would not necessarily anticipate or even make obvious another group. Finally the consideration for patentability is different in each case. Thus, it would be an undue burden to examine all the above inventions in one application.

Moreover, applicant's argument is not found persuasive because, the species are independent and distinct because the claimed species are of different structures which requires a different search for each structure. Furthermore, Applicant has not demonstrated that the species are not patentably distinct and applicant did not submit evidence or identify such evidence now of record showing the species to be obvious variants or clearly admit on the record that this is the case. Therefore, a search of all the claimed species would impose a serious burden on the Office because Applicant has not demonstrated that the claimed species are not patentably distinct structures.

The restriction requirement is still deemed proper and is therefore made final.

Claims 75-78 are withdrawn from further consideration pursuant to 37 CFR 1.142(b), as being drawn to a nonelected invention. Claims 31-74 will be examined on the merits.

Claim Rejections - 35 USC § 103

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

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Claims 31-74 are rejected under 35 US 103(a) as being unpatentable over Romanczyk, Jr (US 6,297,273) in view of Cooke et al. (US 5,945,452).

Applicant claims a food product (i.e. non-chocolate) comprising (i) cococa polyphenol (i.e. a polyphenol compound of formula An of claim 32) and (ii) L-arginine in various amounts.

Romanczyk teaches (see, e.g. abstract and entire patent) a food composition comprising a cococa polyphenol (i.e. a polyphenol compound of formula An of claim 32) that increase nitric oxide production in a subject to treat various claimed disorders (i.e. such as cardiovascular diseases and/or cancer). Romanczyk, however, does not expressly teach that the active ingredient of L-arginine is contained within the claimed food composition nor Romanczyk teach all the claimed forms of the food composition and all the claimed amounts.

Cooke beneficially teaches (see, e.g. abstract, column 4 line 9 and entire patent) that the incorporation of L-arginine within a food product will increase nitric oxide production in a subject to treat various diseases (i.e. cardiovascular disease).

It would have been obvious to one of ordinary skill in the art at the time the invention was made to modify Romanczyk's food composition to include the other claimed active ingredient of L-arginine as taught by Cooke within Romanczyk's food composition because the two above combined teachings would create an improved claimed food composition that would increase nitric oxide production in a subject to treat various claimed disorders such as cardiovascular diseases. Furthermore, the

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adjustment of other conventional working conditions (e.g. the claimed forms of the food composition such as non-chocolate pet food and/or as a peanut and the claimed amounts), is deemed merely a matter of judicious selection and routine optimization which is well within the purview of the skilled artisan.

Accordingly, the claimed invention was prima facie obvious to one of ordinary skill in the art at the time the invention was made, especially in the absence of evidence to the contrary.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Randall Winston whose telephone number is 571-272-0972. The examiner can normally be reached on 8AM-5PM.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Terry McKelvey can be reached on 571-272-0775. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

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Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.


MICHELE FLOOD
PRIMARY EXAMINER